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Trading Stamps and the Law

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STUDENT COMMENTS

TRADING STAMPS AND THE LAW

INTRODUCTION

The controversial, yet seemingly innocuous bits of gummed paper which we know as "trading stamps" are by no means a recent development. They are an outgrowth of the famous old tobacco coupons, soap wrappers and the like, which had great popularity in the late nineteenth century.[1] As early as 1851, the B. T. Babbit Company attached coupons to its soap products which could be redeemed for pictures.[2] The first real trading stamp transaction by today's standards of issuance to the customer pursuant to and in proportion to the amount of the sale, and redeemability in accumulated quantity for items of value,[3] was made by Schuster's Department Store of Milwaukee in 1891.[4] Due to the instant success of the operation, the Sperry & Hutchinson Company was founded in 1896 on the theory that the plan would be more commercially advantageous if operated on organized economies of scale, and is today the largest of the companies set up solely to distribute trading stamps to all types of retailers and offer a plan by which stamps may be redeemed. As is typical of organized trading stamp operations, the company enters into a license agreement with retailers authorizing the latter to use its "Co-operative Cash Discount System," whereby the licensee is furnished with trading stamps at the rate of $14 or $15 for a pad of 5,000 stamps. The licensee then issues these stamps to his customers at the rate of one stamp for each ten cents paid in cash or before the fifteenth of the next month following a retail purchase. The customer pastes the stamp in a book provided by the company, and when the book is filled (1,200 stamps) he takes it or sends it to one of the redemption stations operated by S & H where the book(s) may be exchanged for merchandise. This redeemable merchandise is based on an average retail price in terms of stamps of $2.50 per stamp book. S & H also furnishes its licensees with advertising material and catalogs containing pictures and descriptions of offered merchandise, to be distributed without charge to the licensee-retailer's customers.[5]

If the plan of the independent trading stamp company such as that of Sperry & Hutchinson is not to the liking of a retailer, he may yet operate a trading stamp store by associating with other independents under a reciprocal pooling agreement. If even this does not please him, he may print his own stamps or set up a system of redeemable cash register receipts for exclusive use in his store or stores.[6]

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[1] Comment, 24 Tenn. L. Rev. 557, 558 (1956).

[2] Vredenburg, Trading Stamps 33-35 (Bureau of Business Research, Ind. Univ., 1956).

[3] Haring & Yoder, Trading Stamp Practice and Pricing Policy 3 (Bureau of Business Research, Ind. Univ., 1958).

[4] Wall Street Journal, Aug. 18, 1953, p. 1.

[5] Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 65 N.W.2d 410 (1954). For analysis of the nature of the agreement between the licensor-issuing company and the licensee-retailer, see Sperry & Hutchinson Co. v. Hudson, 190 Ore. 458, 226 P.2d 501 (1951).

[6] See Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E. 2d 177 (1950).

Economic Considerations

Trading stamp companies have several persuasive arguments for their continuance. Included among those most often presented to the courts are that through the use of stamps: (1) the consuming public is benefited by price savings on redemptive merchandise since the consumer is given something of value in addition to his purchase;[7] (2) the issuing merchant through an increase in cash sales is able to reduce collection costs,[8] bookkeeping expenses, bad debt losses and delivery expenses (as cash is usually a cash and carry transaction);[9] (3) a more effective means is employed to increase sales volume than an ordinary cash discount for cash;[10] (4) more customers are enticed into the store, thus creating an over-all trade advantage;[11] (5) a more economical and efficacious means of advertising is employed[12] (especially for the small retailer); and (6) interest charges on capital borrowing may be reduced as a result of cash transactions.[13]

The above arguments have been vehemently[14] counterbalanced, though perhaps not fully refuted by unconvinced retailers and other opponents of stamp plans whose resentment is typified by the following statement.

> Purchasers are deluded into believing that when they receive premium merchandise over the counter they are obaining something for nothing. . . . The retail merchant uses the coupons because he has been led to believe that they will increase his profits, or because he has been forced to adopt them to meet the competition of a neighbor who is using the plan. No greater fallacy ever existed than to think that the coupon scheme is of permanent value to merchandising. The scheme fastens itself upon business like a drug habit. The first effect is stimulating, but it gradually saps away the life blood of the trade . . . . The coupon is an interloper in the field of business, posing as an advertiser while actually it does not advertise, giving to the purchaser a gift for which he must pay . . . , and meanwhile reaping dividends for the stockholders of the premium companies.[15]

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[7] Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939). The dissent quoted from the stamp book in question: "Yellow trading stamps are not something for nothing but something instead of nothing—a discount for the money you spend with the storekeeper. . . . Refusing to take yellow trading stamps from the storekeeper is like forgetting your change."

[8] Weco Prods. Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954). But cf. note 103 infra and accompanying text.

[9] Sperry & Hutchinson Co. v. Hoegh, supra note 5.

[10] Colgate-Palmolive Co. v. Max Dischter & Sons, Inc., 142 F. Supp. 545 (D. Mass. 1956).

[11] Sperry & Hutchinson Co. v. Mechanics Clothing Co., 135 Fed. 833 (C.C.D.R.I. 1904); Weco Prods. Co. v. Mid-City Cut Rate Drug Stores, supra note 8.

[12] Sperry & Hutchinson Co. v. Mechanics Clothing Co., supra note 11.

[13] Sperry & Hutchinson Co. v. Hoegh, supra note 5.

[14] E.g., a full page advertisement placed in the Cincinnati Inquirer, Jan. 19, 1959, p. 4a, denouncing trading stamps as "economic prostitution at its best—economic insanity at its worst."

[15] Kennedy, Are Trading Stamps a Fraud?, 58 Forum 247 (1917).

The temporary advantage enjoyed by the retailer may be equalized by the adoption of competing plans next door or across the street, leaving him with much the same circle of customers but with increased costs which he must pass on to consumers or absorb to his detriment.[16] Thus, although the assertion by the stamp companies that the adoption of their plan will increase sales is admitted by the dissenters, it is with the qualification that such an advantage will exist only so long as other competitors are not coerced into adopting similar plans[17] or do not reduce prices in an effort to lure back lost customers. Yet, even if the adoption of the stamp lure does effect a certain addition to the retailer's gross income, such is not likely to result in added profit. Assuming a retailer had grossed $10,000 weekly without stamps and after their adoption raised his gross to $12,000, it would at first appear that the retailer has garnered a $2,000 bonus, less only the two per cent cost of stamps on this dollar increase. However, as stamps cost the retailer two per cent of the *entire* gross sales or $240, this cost represents *twelve* per cent of the $2,000 gross increase. Had the retailer increased his gross by $5,000 to $15,000, their cost would still be only two per cent of $15,000 or $300. Here, the retailer might realize a profit since the stamps have cost him only six per cent of his gross increase ($300 of $5,000). However, such situations are rare, due not only to the paucity of situations in which such proportional increases in sales occur, but also to a lack of a high net profit to total sales ratio (typically absent in large supermarkets).

As more of the individual retailer's competitors adopt stamp plans, the power of stamps to attract an increasing sales volume will diminish. Consequently, the retailer may be forced to raise prices proportionately, the cost to consumers varying inversely with the power of stamps to attract a sufficiently large sales volume, the ability of the retailer to keep other prices constant, and the willingness of the retailer himself to absorb some of the loss in reduced profits.[18]

From a 1958 study by the United States Department of Agriculture, it would appear to be not the consumer who bears the added cost of trading stamps, but the retailer.

> [T]he merchandise which the consumer receives by redeeming stamps is about two per cent of the purchase dollars required to fill a stamp book and may range from 1⅔ to 2½ per cent, depending on pricing policies of stores from which a similar article could be purchased. This study indicates that average prices paid by con-

[16] The attempts of the stamp companies to alleviate this situation by giving exclusive franchises may invoke Sherman Act problems. See Clapp, Trading Stamps, 23 Ohio St. L.J. 35, 42-55 (1962). See also Merchants Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N.E. 968 (1915).

[17] Lawton v. Stewart Dry Goods Co., 197 Ky. 394, 247 S.W. 14 (1923). This court rejected the retailer's assertion of coercion, holding that although the company may ask one merchant to buy its stamps on the ground that his competitors have bought or intend to buy, such is not a form of coercion of which the law will take cognizance.

[18] Comment, 6 Duke L.J. 71, 82 (1957). It appears that some retailers have considered the competitive advantages of trading stamps lost when all competitors have them and have installed varied games as an additional "lure." Wall Street Journal, Mar. 27, 1963, p. 1, col. 4. See also id., Apr. 2, 1963, p. 18, col. 1.

> sumers in stamp stores increased [only] 0.6 per cent more than in non-stamp stores—a difference equal to about thirty per cent of the average [redeemable] merchandise value of the stamps.[19]

Since the consumer must pay only 0.6 per cent while being entitled to redeemable merchandise equivalent to two per cent of his purchase dollar, the consumer is benefited by the stamp plan. Here again, however, retailers claim that this benefit must be qualified, since by absorbing most of the stamp cost, he (the retailer) is less financially able to apprise the consumer of shopping bargains and value through more traditional advertising means.

Trading stamp foes argue that stamps injure the economy directly, as well as indirectly through injury to themselves. They contend that even if certain price savings are apparently afforded the consumer, they inure only upon redemption; and since many stamps are unredeemed, a clear detriment to the economy is created.[20] Opponents also maintain that stamp schemes introduce a middle man who receives a profit, which they claim adds to the cost of the article;[21] and that such schemes tend, by a promise of a value greater than the article and not represented in its price, to "appeal to cupidity," and thus "lure to improvidence,"[22] encouraging profligate and wasteful buying.[23]

The wide diversity of opinion considering the economic benefits or detriments of trading stamps seems to have been reflected in the judicial attempt to cope with the several situations, legislative and otherwise, in which the legal standing of the innocuous stamp has been challenged.

The Constitutional History of Trading Stamps

The early part of this century saw attempts to bring trading stamps within the ambit of state "lottery" or "gift enterprise" statutes which generally made it unlawful to offer a gift, premium, prize or award involving chance or uncertainty to a purchaser in connection with the sale of merchandise.[24] However, construing these criminal statutes narrowly, it was usually held that the issuance of trading stamps to merchants and in turn to customers, who, upon the accumulation of a certain number, were entitled to select from premiums on display, was not a lottery involving the statutory definition of uncertainty or chance.[25] To constitute a lottery three things

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[19] United States Dep't of Agriculture, Trading Stamps and Their Impact on Food Prices 1, n.2 (1958) (Marketing Research Report No. 295). See generally, Comment, 37 N.Y.U.L. Rev. 1090, 1098-99 (1962) for comparative analysis of the total purchases necessary to acquire the stamps redeemable for each item of merchandise listed.

[20] Comment, supra note 18, at 83. See also note 62 infra and accompanying text for analysis of escheat.

[21] Lawton v. Stewart Dry Goods Co., supra note 17. The concerted efforts of some retailers who agree not to handle stamps received a serious setback in United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961), where such an agreement was held a per se violation of the Sherman Act.

[22] Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916).

[23] Lawton v. Stewart Dry Goods Co., supra note 17.

[24] State ex rel. Simpson v. Sperry & Hutchinson Co., 110 Minn. 378, 126 N.W. 120 (1910).

[25] It is within the police power of a state to provide for the public health, safety or morals. Thus, had trading stamps been found to contain illegal elements of chance or

must concur: (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the contingent right must depend on lot or chance.[26] In the trading stamp operation although the stamps are redeemed by a party other than the one from whom the purchaser obtains them, the premium is dependent upon the acquisition of a certain number of stamps, and the article to be chosen is not definitely named, the actual "prize" received is contingent solely upon the election of the customer appearing with the prescribed number of stamps in hand.[27] Illegal elements of chance, uncertainty or contingency in no way inhere in such an operation, so as to bring it within the scope of general "lottery" or "gift enterprise" statutes under a plea of exercising the police power over the public morals.[28]

Pre-1916 statutes totally prohibiting trading stamp enterprises and activity were held by state courts to violate the due process clause of federal and state constitutions, thus protecting the individual's liberty to make lawfully contracts touching the acquisition, protection, management and enjoyment of property so long as such individual does not wrongfully affect the rights of others, or the public health, safety or morals.[29]

The United States Supreme Court in the 1916 case of *Rast v. Van Deman & Lewis Co.*[30] did not interpret such prohibitory statutes from the same perspective and this was reflected in their result. The *Rast* case involved a suit brought by several Florida trading stamp and profit-sharing coupon merchants who challenged the constitutional validity of a statute which imposed special and prohibitive license taxes on their activity, claiming that such was both beyond the police power of the state to protect the health, safety and welfare of its citizens, and was violative of equal protection as guaranteed by the fourteenth amendment. The Court found the statute to be constitutional, holding that although not a lottery, the stamp business was nevertheless within the regulatory police power of the state. Noting the rationale employed by pre-1916 decisions in holding similar statutes unconstitutional,[31] the Court stated that the reasoning upon which they were based regarded the mere mechanism of the schemes alone and did

uncertainty, they could have been validly prohibited by lottery statutes. Winston v. Beeson, 135 N.C. 271, 47 S.E. 457 (1904).

[26] Id.

[27] State v. Shugart, 138 Ala. 86, 35 So. 28 (1903); Ex parte Drexel, 147 Cal. 763, 82 Pac. 429 (1905); State v. Dodge, 76 Vt. 197, 56 Atl. 983 (1904). Only in Maryland and the District of Columbia did the courts find that legislation encompassed trading stamps, although both were later overruled or repealed. State v. Caspare, 115 Md. 7, 80 Atl. 606 (1911); 75 Stat. 565 (1961), repealing D.C. Code Ann. §§ 22-3401 to -3403(1961).

[28] City of Denver v. Fruehauf, 39 Colo. 20, 88 Pac. 389 (1907); Opinion of the Justices, 208 Mass. 607, 94 N.E. 848 (1911); State ex rel. Simpson v. Sperry & Hutchinson Co., supra note 24; State v. Sperry & Hutchinson Co., 94 Neb. 785, 144 N.W. 795 (1913); Young v. Commonwealth, 101 Va. 853, 45 S.E. 327 (1903); 52 Am. Jur. Trading Stamps § 8 (1944).

[29] Ex parte Drexel, supra note 27; People v. Gillson, 109 N.Y. 389, 17 N.E. 343 (1888); State v. Dalton, 22 R.I. 77, 46 Atl. 234 (1900).

[30] Supra note 22; Note, 29 Harv. L. Rev. 779 (1916). The rationale of the *Rast* opinion was fully supported by two companion cases, Tanner v. Little, 240 U.S. 369 (1916) and Pitney v. Washington, 240 U.S. 387 (1916).

[31] Cases cited note 29 supra.

not give enough force to their influence upon conduct and habit, nor to their "insidious potentialities."[32] Also rejected was the additional contention that the stamp plans were only another phase of advertising, indistinguishable from other promotion methods. It was held that

> advertising is merely identification and description, apprising of quality and place . . . single in its purpose and motive . . . [with] nothing ulterior . . . [while the] schemes of complainants have no such directness and effect. They rely upon something else than the articles sold. They tempt by a promise greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence.[33]

Thus, because of the alleged potential evil effects, anti-stamp legislation falls within the state police power and violates neither the due process, equal protection nor the contract clauses of the federal constitution.

The *Rast* decision did not preclude state tribunals from interpreting similar state constitutional provisions differently. Consequently, only a minority of states[34] have upheld the rationale of the *Rast* case. However, a recent Wyoming case, *Steffy v. City of Casper*,[35] rejecting the "great weight of authority" since 1919, the date of the last case upholding the validity of anti-stamp legislation,[36] adopted the anti-trading stamp argument.[37] The court felt that this "great weight of authority" was premised on a concept of merchandising as an activity devoid of the public interest and beyond the police power, thus rendering purported exercises of the police power to pro-

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[32] Rast v. Van Deman & Lewis, supra note 22, at 364.

[33] Id. at 365. The "improvidence" resulting from the consumers' desire to obtain the redemption premiums might refer not only to buying in excessive quantities, but also to purchasing without regard to grade, quality or price. Wolff, Sales Promotion by Premium as a Competitive Device, 40 Colum. L. Rev. 1174, 1180 (1940).

[34] State v. Crosby Bros. Mercantile Co., 103 Kan. 733, 176 Pac. 321 (1918); State v. Underwood, 139 La. 288, 71 So. 513 (1915); State v. J. M. Seney Co., 134 Md. 437, 107 Atl. 189 (1919); see Pitney v. Washington, 80 Wash. 699, 141 Pac. 883 (1914), aff'd, 240 U.S. 387 (1916). Cf. Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919) (declaring the trading stamp to be a proper object of state police power regulation, but invalidating a discriminatory statute on equal protection grounds); Olson v. Ross, 39 N.D. 372, 167 N.W. 385 (1918); Sperry & Hutchinson Co. v. Weigle, 169 Wis. 562, 173 N.W. 315 (1919).

[35] 357 P.2d 456 (Wyo. 1960).

[36] State v. J. M. Seney Co., supra note 34.

[37] The Wyoming Supreme Court felt that the legislature had the right to find the following facts:

> When any one of the merchants in the same line of merchandise uses trading stamps, that is apt to have the effect of compelling the merchants in the same line of business to also use [sic] the stamps or else be forced out of business . . . [and] . . . when all of the merchants in the same line of business use these trading stamps, whatever benefit the use of stamps might have had is apt to be equalized, resulting in a burden to all the merchants in the same line of business, and is apt to have a further tendency to increase the price of goods in order to recoup the cost of the trading stamps and, furthermore, a tendency to compel some of the merchants to go out of business, thus decreasing competition, giving those merchants who are able to stay in business the power to raise the price of goods contrary to the public interest.

hibit stamps unconstitutional.[38] Such a premise was held to be illusory, there being no "closed class or category of businesses affected with a public interest,"[39] the term meaning no more than an activity subject to control for the public good. When the legislature finds that regulation is necessary to protect the public interest, it is immaterial whether the business be public or private. Legislation will be upheld in all cases where the lawmaking body has acted on reasonable knowledge of actual economic coercion or other facts inimical to the general welfare.[40] To be void, the statute must be clearly arbitrary and capricious. Nor did the legislature make an arbitrary distinction when it excepted from trading stamp prohibition those merchants who issued their own stamps. An organized trading stamp operation, where redemption is made other than through the issuing dealer, necessarily introduces a middleman into the transaction, a third party who makes a profit from the bargaining of the real parties.[41] Thus,

> not only must the merchant pay the stamp company for the cost of the stamps themselves, but must also pay for merchandise not usual to his business, plus the cost of handling and redeeming that merchandise and the necessary overhead involved in that separate activity. In the case where a merchant issues and redeems his own stamps, either in cash or in merchandise from his general stock, it amounts to nothing more than giving a discount on purchases from him; no coercion is exercised or it is at least considerably minimized. This in itself makes a distinction between trading stamps being sold to the merchant by a trading stamp company and a merchant issuing and redeeming his own stamps from his own stock or in cash.[42]

Consistent with this rationale that the legislature may validly limit its prohibition to operations where, in its opinion, the coercive element is magnified, is a series of cases holding self issuing stamp operations validly free of restraints imposed by anti-stamp legislation.[43]

The Wyoming court might also have sustained the distinction on the ground that an additional cost of three per cent of gross sales accompanies third party stamp arrangements whether or not the stamps are ever redeemed.[44] On the other hand, the additional cost of stamps redeemable by

[38] Alabama Independent Serv. Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942).

[39] Nebbia v. People of State of N.Y., 291 U.S. 502, 536 (1934). *Nebbia* began a line of decisions that "culminated in repudiation, not mere relaxation of the doctrine that the legislature is impotent save in exceptional cases . . . [substituting] . . . for the doctrine that gave primacy to 'liberty of contract' a test of reasonableness of legislation, under which a heavy burden was cast upon the party challenging the validity of the legislature's judgment." 1959 Ann. Surv. Mass. Law § 9.2.

[40] Blue & Gold Stamps—U—Save Premium Co. v. Sobieski, 190 F. Supp. 133, 137 (S.D. Cal. 1961); Steffey v. City of Casper, supra note 35. See dissenting opinion in Sperry & Hutchinson v. Hoegh, supra note 5.

[41] State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917).

[42] Steffey v. City of Casper, supra note 35, on rehearing, 358 P.2d 951 (Wyo. 1961).

[43] State v. Crosby Bros. Mercantile Co., State v. J. M. Seney Co., supra note 34.

[44] Cf. text accompanying note 21 supra. Trading stamp companies successfully rebut this latter contention by stating that this cost differential is more than offset by

the merchant is only the printing and handling costs plus the cost of the merchandise exchanged for stamps *actually* redeemed;[45] neither the retailer nor the consumer pays for unclaimed merchandise.[46]

The *Steffey* decision was the first in forty-one years to expressly place such legislation within the police power of the state. Trading stamp companies argue that the majority of courts have found such laws to be unconstitutional and improper exercises of the state police power. However, most of the cases usually cited by the stamp companies as within the "majority"[47] could be distinguished as having been decided not on the basis of the public interest and the police power, but because the statute amounted to discriminatory class legislation, for which no reasonable basis in fact demonstrably existed. Equal protection under the law was the real concern of the courts. Thus, many of the cases falling within the "great weight of authority" were held unconstitutional for the reason that prohibition or merely imposition of a tax upon those merchants who issue third party redeemable trading stamps yet exempting those who give and redeem their own is arbitrary and capricious class legislation.[48] There is no general legislative power to pass laws dispensing with middlemen. To be regulated, such middleman activity must be encompassed by the police power. If otherwise, agents, brokers, commission and wholesale merchants could be legislatively exterminated.

Other cases cited by stamp protagonists might be distinguished because of the particular statute involved. Thus, a statute requiring gasoline stations to post their prices in a particular manner and prohibiting premiums, rebates or benefits tending to lower these posted prices was held to be an arbitrary and irrational restriction upon lawful business.[49] Absent the injuries resulting from elimination of competition[50] between dealers, the mere fact that one dealer manages to induce trade away from his competitors does not subject his action to legislative regulation.

Only a small minority of the cases constituting the "great weight of authority" have dealt with and found unconstitutional a statute *totally* prohibiting trading stamp activity as an invalid exercise of the state police

the fact that the large stamp company can be run more efficiently due to organized economies of scale, the very premise on which they were founded.

[45] Note, 25 Tenn. L. Rev. 397, 403 (1958).

[46] Sperry & Hutchinson v. Hoegh (dissenting opinion), supra note 5.

[47] Sperry & Hutchinson v. State, supra note 34; Opinion of the Justices, 226 Mass. 613, 115 N.E. 978 (1917); People ex rel. Attorney Gen. v. Sperry & Hutchinson Co., 197 Mich. 532, 164 N.W. 503 (1917); Logan's Supermarkets, Inc. v. Atkins, 202 Tenn. 438, 304 S.W.2d 628 (1957); State v. Holtgreve, 58 Utah 563, 200 Pac. 894 (1921).

[48] Sperry & Hutchinson v. Hoegh, supra note 5.

[49] Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269 (1940). Accord, People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939); State v. White, 199 Tenn. 544, 288 S.W.2d 428 (1956). See also People v. Fromer, 231 N.Y.S.2d 581 (Magis. Ct. 1962), where in holding that the issuance of stamps was not a price reduction and therefore not violative of the posted price statute, the court ignored a previous Court of Appeals decision that they *were* a price reduction in violation of the fair trade laws. See note 88 infra.

[50] Where the market (gasoline) is inelastic, with motorists buying as much gasoline as they need, regardless of inducements to buy, the "lure to improvidence" rationale is not a sound basis for legislative prohibition. People v. Victor, supra note 49.

power.[51] However, the Montana Supreme Court recently held that a "Killum dead trading stamp statute," imposing a prohibitive license fee on any place of business which offered a stamp or other similar device redeemable in merchandise, services or cash constitutes an invalid prohibition of a legitimate business activity. In the absence of a state of facts reasonably evidencing "coercion" or some other fact inimical to the public good, the court felt that the legislative act must be found unconstitutional as an unreasonable exercise of the police power.[52]

Previously limited to the protection of the public health, safety and morals, the tendency has been to extend rather than to restrict the scope of the police power. Today the state may exercise its "fundamental power to establish regulations necessary to secure the health, safety, good order, comfort, or general welfare of the community, [but] defined 'with some strictness, so as not to include everything that might be enacted on grounds of mere expediency.' "[53] Since the Supreme Court has determined that such legislation is not arbitrary and may be found to have a basis in reason,[54] it is difficult to conceive a court today, if presented with this legislation for the first time, overturning a prohibition on trading stamps. As a result of this expanded concept of the police power, modern courts would probably find anti-stamp legislation constitutional where uniformly prohibitory[55] and based on a reasonable legislative finding of actual economic coercion or other fact inimical to the general welfare.[56]

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[51] The few cases which hold that totally prohibitive stamp legislation is beyond the police power do so on the theory that there is no reasonable relationship between the prohibition of the giving of the premium and the protection of the public health, morals and safety. Lawton v. Stewart Dry Goods Co., supra note 17.

[52] Garden Spot Market, Inc. v. Byrne, 378 P.2d 220 (Mont. 1963). Accord, State v. Lothrap-Farnham, 84 N.H. 322, 150 Atl. 551 (1930) (statute held unconstitutional which required those selling, issuing, exchanging or redeeming trading stamps to make a deposit of $10,000, pay a license fee of $250 to $1,000, and pay excise taxes equal to 10% of sales of stamps and 3% of gross receipts).

[53] Commissioner of Labor & Ind. v. Boston Housing Auth., 1963 Mass. Adv. Sh. 159, 165-66, 188 N.E.2d 150, 156-57.

[54] Although there is strong language in *Rast* affirming the correctness of the legislative presumption of undesirable enticing, the Supreme Court has recently updated that opinion to the modern norm of the "reasonableness" of the legislative presumption. See Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959) (holding as reasonable state legislation allowing trading stamps but prohibiting other forms of price reduction).

The disappointing analysis of the problem in the *Garden Spot* decision (supra note 52) merely amounts to categorization of the case as a trading stamp case and then counting heads among sister state decisions in this category. While such decisions are not entirely irrelevant in construction of a particular state's constitution, the importance given them by the Montana Supreme Court is unfortunate, particularly in view of the fact that a majority of such cases were decided before the fulfillment of the expansion of the scope of the police power. See 1959 Ann. Surv. Mass. Law, supra note 39.

[55] Even if attacked as not being uniformly prohibitory, the legislation will not be found unconstitutional where the statutory classification has a basis in reason. McGowan v. Maryland, 366 U.S. 420, 524 (1960) (separate opinion); Safeway Stores v. Oklahoma Retail Grocers Ass'n, supra note 54; Goessart v. Cleary, 335 U.S. 464, 467 (1948); Blue & Gold Stamps-U-Save Premium Co. v. Sobieski, supra note 40. Presently, only Kansas and Wyoming have directly prohibitive stamp statutes: Kan. Gen. Stat. §§ 21-2801 to -2805 (Supp. 1957); Wyo. Stat. Ann. § 6.224.1 (Supp. 1961).

[56] Steffey v. City of Casper, supra note 35. It may be, however, that here, as in

ESCHEAT

Mainly deriving profit from the difference between the price charged merchants for the stamps and the wholesale cost of the redeemable goods, trading stamp companies also profit by the fact that some of the stamps distributed, either through loss, destruction or inadvertence, are never presented for redemption. Recently, in *State by Richman v. Sperry & Hutchinson Co.*,[57] New Jersey sought to include such unclaimed funds within its escheat statute[58] on the grounds that this reserve in the company represented abandoned property.[59] The state argued that the issuing of stamps was a closed cash discount transaction, the discount being fully earned upon the payment of the purchase price. The issued stamp is evidence of a fixed property right in the purchaser, fully vested when he surrenders his privilege of buying on credit. Consequently, each stamp, although intrinsically worthless, is "something for something." By analogizing trading stamps to other choses in action which represent immediate fixed obligations upon issuance,[60] the state contended that Sperry & Hutchinson was bound to redeem every stamp. The state, standing in the stead of the nonredeeming consumers, would not be required to present full books for redemption in order to escheat the reserved funds because of its ultimate possessory power over previously vested rights in these citizens.

Sperry & Hutchinson answered that although the stamp itself was indeed the escheatable object, it was not a fixed and definite "debt" as are other admittedly escheatable objects such as stock dividends.[61] Therefore, once the company has delivered the stamps to the retailer with a promise to redeem, the contract is fully executed as between it and the retailer. In practical effect, the consumer who ultimately receives the stamps in connection with his purchase becomes a third party beneficiary to the contract.[62]

other areas, the courts may be suspicious of "undetectable discrimination or subjective notions of policy." Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359, 560, 584-86 (1947). The circumstances in which much anti-stamp legislation is passed does not aid in removing such suspicion.

[57] 23 N.J. 38, 127 A.2d 169 (1956), on remand, 49 N.J. Super. 165, 139 A.2d 463 (1958), aff'd, 56 N.J. Super. 589, 153 A.2d 691 (1959).

[58] Custodial Escheat Act, N.J. Rev. Stat. § 2A:37-11, 37-29 (1951).

[59] Originally limited by concepts of feudal tenure to realty, the escheat power was statutorily extended to encompass personal property, both tangible and intangible, including unpaid bank deposits, wages, stock certificates and dividends. State by Parsons v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565 (1950), aff'd, 341 U.S. 428 (1951); State v. Otis Elevator Co., 12 N.J. 1, 95 A.2d 715 (1953).

[60] The premise of this argument is that the essential aspect of the trading stamp business is the giving of a discount for cash or that the trading stamp is a mere price-cutting device. However, the function of the stamp as a symbol is not merely to induce a single purchase of the retailers offering but to provide an incentive for continued patronage, such being in effect, more nearly an advertising device. Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939). Cf. note 86 infra and accompanying text.

[61] When a corporation declares a dividend and specifically sets apart a fund in a separate bank account for purposes of its payment, the moneys become the trust property of the stockholders distributively. The corporation has the ministerial obligation of delivering to each stockholder his proportionate share upon proper request by him; it has no legal or moral claim to the fund except for the naked right to custody. State by Furman v. Jefferson Lake Sulphur Co., 36 N.J. 577, 178 A.2d 329 (1962).

[62] Comment, supra note 18, at 91. Cf. note 126 infra and accompanying text.

As such, however, he doesn't initially possess a direct right against the company, but rather a right residing in the stamp itself which ripens only upon presentation of a requisite number of stamps to the company for redemption. The accumulation of a full book of stamps is more than a mechanical condition in the enforcement of a right;[63] it is a prerequisite to the existence of any debt right against the company.[64]

The New Jersey court decided that its statute does not escheat balances of an individual or corporation merely because the funds cannot be accounted for. It does escheat property owned by or owed to persons known or unknown, and deemed to have been abandoned by them.[65] The right of the state is purely derivative, taking no greater or higher interest than the unknown or absentee owner. Escheatable property, if any exists, is that which the recipient of the stamp had and did not see fit to redeem, not the balance in the company's hands set aside for their possible redemption.[66]

> The statute cannot create or revive obligations which never existed, and by statute, contract and practice, the cash or merchandise can only go to the collector of the stamps upon presentation of stamps as required thereby.
>
> [In all prior cases under the escheat statute] the State was able to clearly show that certain debts or claims were due and payable to certain individuals known to be in existence at that time, but whose whereabouts or successors at the time of the action were unknown. In this case all the state can show is that in the past the company has issued a certain number of stamps to its licensees who are presumed to have passed them on to their customers, and that approximately five per cent of those issued have not been redeemed.[67]

Thus the state lost in its escheat attempt due to the generality of the statute and its inability to show a fixed obligation residing in the stamp company.

Recently proposed escheat legislation, specifically directed toward stamp companies seeks to avoid the pitfalls of the general New Jersey statute. This legislation provides that the "cash" value of the stamp be printed on its face and that redemption be provided for in nominal numbers, thus removing not only the "full book" requirement but also the objection that the obligations are not fixed and definite. Other provisions require that the date and state of issue appear on the face of the stamp, and that the stamp companies

[63] As further evidence of the fact that no debt is owing the consumer, the company points out that its initial obligation to the consumer, expressly stipulated in the company-retailer contract, is not definite. By its terms, the company reserves the right to alter the redemption value of the stamp at any time prior to redemption. Ibid.

[64] State by Richman v. Sperry & Hutchinson Co., supra note 57, at 603, 153 A.2d at 699.

[65] 49 N.J. Super. at 172, 139 A.2d at 466.

[66] State by Parsons v. Standard Oil Co., supra note 59.

[67] State by Richman v. Sperry & Hutchinson Co., supra note 57, at 173, 139 A.2d at 467. The nonredemption estimate was primarily based on the fact that since 1928, Sperry & Hutchinson has paid income taxes on the amount attributable to unredeemed stamps as part of its profits. The Internal Revenue Bureau has accepted this estimate as the true percentage of unredeemed stamps. 56 N.J. Super. at 594, 153 A.2d at 694; Comment, supra note 19, at 1097.

periodically account for the number of stamps issued during the statutory period, so that an accurate assessment might be made of a particular company's escheatable obligations.[68]

Such proposals, however, will probably not be followed. The basis for such reasoning, as logically argued by the stamp companies themselves, is that escheat legislation requiring them to check individual stamps for date of issue vis-à-vis date of redemption would be manifestly prohibitive due to the commercial impracticality of minutely scrutinizing every stamp in every stamp book presented for redemption. Further, if the five per cent stamp reserves are escheated, the premium value to the consumer will have to be decreased since the profit margin of the company will have been markedly diminished.

Should specific statutory wording be able to creat a "debt" in the stamp company by some legislative means not yet considered, the fact that non-redemption reserves represent the property of consumer-citizens of several states does not constitutionally prevent the state of incorporation from validly claiming such reserves under its escheat statute. The Supreme Court of the United States has held that the state of incorporation possesses power to seize such unclaimed debts or demands against a resident corporation under its escheat laws, and that this escheat must be given "full faith and credit," even though the certificates of indebtedness (stamps) represent the unclaimed property of foreign citizens.[69]

Fair Trade

One manifestation of the confusion and controversy evoked by the continued existence of trading stamps, is the contention that their issuance with the sale of a fair trade commodity, at the fair trade price, constitutes an unlawful price reduction. The question has been extensively litigated in the courts and subsequently "relitigated," as it were, in the relative security of law journals; indeed, it is arguable which examination has yielded the more fruitful analysis. It is hoped, however, that in the following pages, the issues can, at least, be more clearly framed.

Fair Trade Laws, existing in nearly every jurisdiction, are one form of resale price maintenance. They are, in part, the product of the modern phenomenon of nation-wide markets, advertising and familiar brand-names.[70] For the purposes of this comment, the essence of the statutes is the judicial recognition of a contract between the manufacturer and the retailer which sets the minimum price below which the trade-marked product, competing

[68] See Comment, supra note 18, at 93.

[69] State by Parsons v. Standard Oil Co., supra note 59, aff'd, 341 U.S. 428 (1951). The problem of unredeemed stamps has come to the attention of the Massachusetts legislature. See S. Bill 363 compelling the individual stamp companies to redeem stamps of all companies, thus facilitating redemption. Such legislation would stand little chance of validity under the rationale of Attorney General v. Boston & Albany R.R., 160 Mass. 62, 35 N.E. 252 (1893), which held unconstitutional a statute requiring all railroads to honor and redeem the passenger tickets issued by other railroads competing in Massachusetts, on the ground that such would appropriate individual property to the public use without the owner's consent. But cf. Opinion of the Justices, 278 Mass. 607, 181 N.E. 833 (1932), requiring banks to organize for purposes of inter-bank loans.

[70] McLaughlin, Fair Trade Acts, 86 U. Pa. L. Rev. 803 (1938).

openly with commodities of the same general class, cannot be sold.[71] The acts generally make the "advertising, offering for sale or selling any [fair trade] commodity at less than the price stipulated . . . unfair competition." [72] Thus it would appear that the problem is to determine first whether the issuance of even one stamp in conjunction with the sale of a fair trade item constitutes such a price reduction.[73]

The statutes were enacted as a response to the widespread price cutting which existed in the mid-thirties often in the form of loss-leaders, which purportedly injure the name and good will of the manufacturer.[74] The laws are based on the premise that part of the good will that the manufacturer retains in his branded product, even after it finds its way to the merchant's shelves, is the price at which it is sold.[75] The fair trade laws gave a legal existence to that type of conduct which previously had been declared illegal pursuant to the dictates of the Sherman Act.[76] Thus the legislative judgment which led to the adoption of such laws, which are in derogation of the common law right to sell freely at any price,[77] rests upon the proposition that such price cutting devalues the good name of the product in the public mind.[78] Further, legislative theorizing envisions the eventual unwillingness of many retailers to continue carrying these brands or to vigorously attempt to sell them when price cutting makes it unprofitable for them to continue such competitive practices.[79] This, in turn, results in a decrease in sales for the producer and a loss of available distributive outlets for the consumer.

Not all of the statutes are identical. A substantial number, specifically

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[71] Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183, 194 (1936); See Note, 37 B.U.L. Rev. 154 (1956).

[72] Mass. Gen. Laws Ann. ch. 93, § 14B (1958).

[73] Trading stamps ordinarily become involved in this type of litigation either directly, when a manufacturer or retailer commences proceedings against a retailer who is issuing stamps with the item at the fair trade price, or indirectly, when in a suit for an injunction against the retailer for direct price cutting, he raises the defense of "unclean hands." He asserts that the manufacturer failed to enforce his contracts against stamp-issuing retailers, which, it is alleged, is a form of price cutting.

[74] Bristol-Myers v. Lit Bros., supra note 60.

[75] Old Dearborn Distrib. Co. v. Seagram Distillers Corp., supra note 71.

[76] Ibid. See Comment, 105 U. Pa. L. Rev. 242, 251 (1957).

[77] General Elec. Co. v. R. H. Macy & Co., 199 Misc. 87, 95, 103 N.Y.S.2d 440, 449 (Sup. Ct. 1951).

[78] Note, 63 Harv. L. Rev. 366 (1949).

[79] See Comment, supra note 76, at 252. See also Royal Farms, Inc. v. Minute Maid Co., 236 N.Y.S.2d 368 (Sup. Ct. 1962), where the court denied a non-stamp retailer's claim that a manufacturer, advertising "prizes worth 20 million trading stamps" to purchasers, was unfairly injuring the retailer, by an inference that the product should be purchased only from retailers who give trading stamps. The court did not mention the Robinson-Patman implications involved in situations where a wholesaler, regardless of whether it advocates purchasing at a particular class of retailers, assumes the promotional expenses (advertising trading stamps) of a particular class of retailers. See Ace Books, Inc., 1963 Trade Reg. Rep. ¶ 16,325 and General Elec. Co., id. ¶ 16,330. In addition, it might be said that such concerted action by a wholesaler, in a state where the stamps are in violation of the fair trade laws, is a "waiver or abandonment of the rights conferred by the contract; otherwise, unjust discrimination, instead of a fair trade, would be the product of the statute." Hutzler Bros. Co. v. Remington Putnam Book Co., 186 Md. 210, 214, 46 A.2d 101, 103 (1946). But cf. General Elec. Co. v. Kimball Jewelers, 333 Mass. 665, 132 N.E.2d 652 (1956).

prohibiting types of indirect price cutting, have been generally interpreted to encompass the distribution of trading stamps.[80] To this extent, one's perspective is to be focused on those jurisdictions, such as Massachusetts, New York and Pennsylvania, whose statutes are patterned after the pioneer law of California. These confine themselves to a somewhat broad declaration,[81] and leave interpretation to the courts rather than to administrative rulings.[82] Herein lies the crux of the problem. When confronted with an alleged violation of the fair trade law by the issuance of the stamps, the answers offered by the courts seem to have stemmed only in part "from judicial contemplation of the character of a trading stamp transaction."[83] Unfortunately, the problem cannot be approached through a compartmentalized delineation—fair trade considerations on the one hand and trading stamps on the other—with a final judgment arising from a balancing of separately reached conclusions.[84]

On first thought, it would appear that if manufacturer X contracts with retailer Y to sell item Z at no less than $1, and in sales, Y gives to each patron ten stamps valued at two cents, in effect this differs little from selling the item at ninety-eight cents. The majority of the courts, however, have concluded that the more accurate analogy is to certain promotional devices, such as free parking, which have been held not to violate fair trade laws.[85] The similitude is found in the fact that the stamps are given with all purchases, and are thus deemed to be a type of institutional promotion to induce the customer to patronize the particular establishment more often, rather than a singling out of any fair trade item for a price reduction. Further, from the free parking or free delivery service to which some pecuniary value can perhaps be assigned, trading stamps are compared to such an intangible service as orchestral music within the store.[86]

Nevertheless, distinctions appear obvious; the value of making them is another question. Noteworthy are the views articulated in the dissenting opinion in the leading case of *Bristol-Myers v. Lit Bros.*[87] The two dissenting justices emphasized the fact that because there was a direct relation between the money spent in purchases and the amount of stamps received,

[80] See, e.g., Lambert Pharmacal Co. v. Roberts Bros., Trade Reg. Rep. (1950 Trade Cas.) ¶ 62,669, at 63,923 (Or. Cir. Ct. 1950); rev'd on other grounds, 192 Or. 23, 233 P.2d 258 (1951). The relevant statute provided that "the offering, or the making of any concession of any kind whatsoever, whether by the giving of coupons or otherwise," in connection with any sale of price-fixed commodities should constitute unfair competition. But see, Wis. Stat. Ann. § 100.15(2) (1957), which expressly prohibits the issuance of stamps with these sales.

[81] See, e.g., supra note 72.

[82] Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., 166 Misc. 342, 2 N.Y.S.2d 320, 323 (Sup. Ct. 1938).

[83] Note, 45 Calif. L. Rev. 378 (1957).

[84] In view of the still controversial nature of the fair trade laws, it would appear that the outcome of many of the trading stamp cases is, in part, determined by the court's hostility to the statute, which manifests itself in a strict interpretation of the law.

[85] Note, supra note 83, at 381. Yet the two cent discount analogy would seem especially arguable where the stamps are redeemable for cash.

[86] Bristol-Myers v. Lit Bros., supra note 60, at 89, 6 A.2d at 847.

[87] Id. at 92, 6 A.2d at 849.

there was likely to be a direct association in the mind of the individual buyer between the price and the particular article, as compared to free parking and similar services. As to the latter, it was suggested that "he does not associate the receipt of these gratuities with the price of the particular article which he may purchase. There is consequently no injury to the trade-name or the good will of the manufacturer." [88]

Every time the housewife opens her canned supper with the stamp-purchased electric can-opener, the premium obtained is, by its constant presence and use, very clearly identified in the consumer's mind with the stamps saved and the stores where they were obtained. But are they further associated with the particular purchases for which she was given the stamps? This potential cognizance would assume manifest importance. If the public's conceptual reaction to price cutting of the manufacturer's product is allegedly damaging to the latter's good will in his product, it would appear axiomatic that their reaction to the issuance of stamps, as compared to a free parking service, in relation to the fair trade commodity purchased, would be conclusive on the question of statutory violation. Admittedly, such an inquiry might well sail the judicial ship into areas both subjective and perplexing, but merit may lie in pursuing such a course.

It would seem relevant that the stamp companies, in their advertising, urge one to be "thrifty" and shop only where their stamps are offered. Thus, it is argued, "the fact that the discount is in the form of a stamp redeemable in merchandise rather than in the form of a direct cash rebate, which could be used to purchase the same merchandise, is wholly immaterial." [89] It may also be significant that one benefits by the free parking or air conditioning whether or not one actually negotiates a purchase. Again, it would seem essential to distinguish between services directly associated with the price of the purchase and those that are not so related. Applying this standard to the trading stamp, the court in *Bristol-Myers v. Picker*,[90] stated that the benefit to the customer is "directly, proportionately, inseparably and specifically related to the article purchased and its price." [91]

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[88] Id. at 96, 6 A.2d at 850. The two jurisdictions which have held the issuance of stamps to be violative of the fair trade law have not deemed it necessary to consider such harm to the manufacturer's good will—as *any* price reduction is in violation of the statute. Bristol-Myers v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950); Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958).

It should be noted that the rationale of the above cases would not be determinative of sales below cost violations since the latter usually have been interpreted, for constitutional reason, to require a specific intent to injure. Mott's Super Market, Inc. v. Frassinelli, 148 Conn. 481, 172 A.2d 381 (1961); 3 B.C. Ind. & Com. L. Rev. 250, 253 (1962).

[89] Bristol-Myers v. Lit Bros., supra note 60, at 93, 6 A.2d at 849.

[90] Bristol-Myers v. Picker, supra note 88.

[91] Id. at 68, 96 N.E.2d at 180. The validity of this opinion in New York has been questioned elsewhere (37 N.Y.U.L. Rev. 1112) on the basis of two subsequent lower court decisions: Libow v. Freeport Drug Shop, Inc., 29 Misc. 2d 928, 218 N.Y.S.2d 897 (Sup. Ct. 1961); Ramo v. Excel Pharm. Inc., 19 Misc. 2d 794, 186 N.Y.S.2d 548 (Sup. Ct. 1959). However, *Libow* merely decided that an injunction would not issue where there was not shown the existence of a fair trade contract. Its further holding that there must be a showing of adverse affect on the good will of the manufacturer is clearly contra to New York law, Bristol-Myers v. Picker, and especially in an action in equity. Calvert Distillers Corp. v. Nussbaum Liquor Store, supra note 82. *Ramo* merely held

It is here suggested that the motive of the stamp-issuing retailer is wholly extraneous to a determination of the applicability of fair trade legislation to the stamp plans. Without doubt, the merchant is concerned with inducing customers to patronize his store,[92] but would not this logically apply to any violation of the fair trade laws, such as a direct cash reduction or the giving of two items for the price of one?[93] Similarly unconvincing, standing alone, is the contention that because the stamp plans were in existence long before the passage of the fair trade laws, they should not now be brought within the purview of the statute.[94] Certainly direct price cutting itself was also an established form of business practice before the adoption of the acts,[95] and as to the meaning of the language of the statute, this is a question of interpretation not to be glibly written off with a passing reference to longevity.

Despite this, most courts have resolved the controversy by treating the stamps as a cash discount—a term of payment rather than a price adjustment, a mode of financing as compared to a price reduction.[96] To be sure, there are these merchandising aspects to the stamp plans, but to emphasize only this is perhaps unrealistic. It is stated that the use of these stamps is a reward, as it were, for prompt cash payment. Such use is especially practical because clearly no coin would be small enough to give a discount on a ten or fifteen cent purchase.[97] This view was crystallized as early as 1904:

> We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase;

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that, while the manufacturer would have standing to enjoin sale of his trade product, it was not clear that a third party to the fair trade contract had such standing, and thus the preliminary injunction was denied. This result is doubtful in view of the language of the New York Fair Trade Statute, N.Y. Gen. Bus. Law § 369-b, giving a cause of action to "any person damaged thereby." See Whelan Drug Co. v. Doz, Inc., 16 Misc. 2d 639, 183 N.Y.S.2d 255 (Sup. Ct. 1958). In view of the legal difficulties involved in the retailers' attempts to boycott and declare as unfair the trading stamps, it would seem that, at least in Massachusetts and New York, the retailers could carry their fight to the courts by means of enforcing the fair trade laws.

[92] Weco Prod. Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942); accord, Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956).

[93] Bristol-Myers v. Picker, supra note 88, at 67, 96 N.E.2d at 180.

[94] Note, 21 Albany L. Rev. 272 (1957).

[95] Supra note 93.

[96] Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954). This same rationale has been employed to determine that the issuance of stamps is not in violation of any "sales below cost" statute. See Safeway Stores v. Oklahoma Retail Grocers Ass'n, 322 P.2d 179 (Okla. 1958), aff'd, 360 U.S. 334 (1958); Food & Grocery Bureau v. Garfield, 20 Cal. 2d 228, 125 P.2d 3 (1942); Trade Commission v. Bush, 123 Utah 300, 259 P.2d 304 (1953); nor a security within the blue sky laws, Sperry & Hutchinson v. Hudson, 190 Or. 458, 226 P.2d 501 (1951). A further manifestation of the consequences of identifying stamps with the orthodox cash discount is the tax implications of such a relationship. It has been held that the retailer may not deduct the value or cost of the stamp in computing the sales tax. State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960), wherein the court asserted that under the statute, the term cash discount referred to an immediate cash reduction for prompt payment. Contra, Eisenberg's White House, Inc. v. State Bd. of Equalization, 72 Cal. App. 2d 8, 164 P.2d 57 (Dist. Ct. App. 1945).

[97] Sperry & Hutchinson Co. v. Hudson, supra note 96.

> and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case, or change the real and substantial character of the transaction.[98]

The court, in effect, adopted wholesale the accountant's distinction between a cash discount and a price reduction, with the stamp considered as "the economic counterpart of the free extension of credit."[99] The latter is accepted as not within the purview of the fair trade laws.[100]

It is possible, however, that this is not the orthodox cash discount, but in fact closer to the situation wherein the retailer is selling two articles for the price of one; this clearly would be prohibited by the acts.[101] It has been noted that those factors and theories which compelled the accountant's conclusion are not necessarily determinative of the legal question. The present query should be answered in the light of an analysis of the legislative intent behind the fair trade laws and a critical scrutiny of the effect of these stamps on the trade name.

In short,

> to hold that the distribution of trading stamps is not a violation because the stamps represent a 'cash discount' which, according to accounting procedure, is a cost of selling rather than a reduction in price, subordinates the legal question to the accounting conclusion . . . [which] is an arbitrary one . . . , designed primarily to achieve consistency with the same enterprise's accounting treatment of similarly ambiguous transactions. . . .[102]

Regardless of the propriety of the results reached by the majority of the courts that have examined this problem, the framework within which their responses have been phrased leads one to suspect that convenient conclusions have been substituted for analysis, and that the basic problems have gone unconfronted.

One inherent difficulty with applying the cash discount label is the fact that most large retail food markets are not generally known to offer credit.[103] It would appear spurious to conclude that stamps are a discount in return for cash payment since food stores, as a rule, operate on a cash basis and this would be demanded of the consumer in any case. The California court in *Food & Grocery Bureau v. Garfield*[104] directed its attention to this problem:

> The fact that the appellant conducts his business on an all-cash basis does not preclude him from giving a cash discount. On the contrary, the cash discount is even more vital to the all-cash store than to the cash and credit store because the proprietor of the former has staked

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98 City of Winston v. Beeson, 135 N.C. 191, 200, 47 S.E. 457, 461 (1904).

99 Note, 25 U. Cinc. L. Rev. 527 (1956).

100 Sunbeam Corp. v. Klein, 32 Del. Ch. 65, 79 A.2d 603 (1951).

101 E. R. Squibb & Sons v. Charline's Cut Rate, Inc., 9 N.J. Super. 328, 74 A.2d 354 (1950).

102 See Comment, supra note 76, at 248.

103 Bristol-Myers v. Picker, supra note 88, at 73, 96 N.E.2d at 181.

104 Supra note 96.

> his entire enterprise upon the ability to attract a cash trade and has been willing to forego the patronage of those customers who buy their goods upon credit.[105]

Although one might well choose to regard the appellant's competitive response as a price reduction, the above passage would at least appear to illustrate the inadequacy of the terminology as applied in this area. Conversely, it may also be significant to note that some retailers will issue stamps even though the purchases are often made with the ubiquitous credit card—and not for cash.

That the dangers inherent in the issuance of stamps are very similar to those arising from direct price cutting would seem to manifest itself in the development of the so-called "bonus stamp days." If really analogous to cash discounts, it seems incongruous that such a practice would be employed. Indeed, a recent Oklahoma case, while refusing to enjoin the issuance of stamps under the existing legislation, did sustain the prohibition as against extravagant bonuses and extras.[106] Under this system, many stores designate a certain day of the week as one where double stamps are allowed for each purchase, or perhaps only with the selection of certain specially marked items. The reasons behind this development appear to be two-fold. First, almost without exception, the designated day is the recorded weakest sales day for the particular concern. Second, as the various stamp plans infiltrate a given geographical area, the competitive advantage once held by the initial distributor of these coupons is substantially diminished, and as a further inducement to patronize he resorts to this type of "price slashing." Under such circumstances the cash discount label appears poorly chosen.

This practice, however, has not gone unnoticed by the courts. It has been suggested, in a somewhat different context, that the courts are not helpless to act when confronted with an "obvious subterfuge."[107] Perhaps one might conclude that if such stamp bonuses were to occur on a widespread basis, the courts might be less disposed to accept the cash discount terminology. However, this might involve an implicit admission that the issuance of even one stamp is in fact an ascertainable reduction in price, although not significant enough to constitute a violation of the applicable statute. A price cut would then not always be a price cut when viewed from the perspective of the legislative intention to protect the good will of the manufacturer.

It can be argued that because the statutes were a response to the predatory price cutting and vicious practice of loss-leaders that thrived in the mid-thirties, the issuance of stamps is not properly brought within the scope of the fair trade laws. Conceivably the Pennsylvania court stretched this concept too far when it invoked the de minimis doctrine,[108] but inherent in its decision is the view that the statute should not be interpreted in a vacuum. Thus, in a jurisdiction with a fair trade law patterned after the

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[105] Id. at 233, 125 P.2d at 6.

[106] Safeway Stores v. Oklahoma Retail Grocers Ass'n, supra note 96.

[107] Bristol-Myers v. Picker, supra note 88, at 67, 96 N.E.2d at 184. Cf. Guerlain, Inc. v. F. W. Woolworth Co., 297 N.Y. 11, 74 N.E.2d 217 (1947).

[108] Bristol-Myers v. Lit Bros., supra note 60.

broad pronouncements of the California statute, it is still true that "until the legislature has declared its policy as to indirect price cutting, the results will, in large part, depend upon the willingness of the court to extend the operation of the statute beyond its express language."[109]

A different answer would seem to be in order, if, as some commentators have suggested, the fair trade laws were pressured to passage by the retailers, their primary purpose being to negotiate a certain freedom from competition.[110] This may well be a carrying of legislative psychoanalysis to an extreme.

In conclusion, then, fair trade laws have been rendered an ineffective weapon for both manufacturer and retailer against the issuance of trading stamps. Relief, if desired, would have to come from the adoption of a remedial statute, but this result is unlikely in the foreseeable future because trading stamps are currently enjoying extraordinary popularity among the consumer, and it might be added—the voting public.

It is submitted that despite the technical justification for the *Picker* decision, as representative of the minority position, the better view is that the issuance of the stamps does not constitute a violation of the fair trade laws in light of the statutes' intended purpose. The fact that the stamps are given with all purchases and are, individually, of infinitesimal value, probably results in no harmful reaction by the consumers in relation to the manufacturer's interest in maintaining the "single complex in the consumer's mind" of uniform name, appearance, quality and price.[111]

The fair trade laws should not be so interpreted as to exclude unqualifiedly all competition which indirectly affects the fair trade price.[112] Having so concluded, however, it would not be inconsistent for the courts to direct their attentions to the practice of exhorbitant stamp give-aways which, in a given situation, may well direct the consumer's concern away from the enterprise and expected premium to the price of a particular product. It is hoped that decisions rendered from the perspective suggested here would prevent further distortions of the fair trade laws (from their intended purpose) by those courts essentially hostile to the stamp plans per se, as well as those jurisdictions which stretch for a desired result in an alien framework.

Restrictions on Transferability

Certain restraints are imposed by the stamp companies upon the merchant's ability to distribute stamps. In actual practice, this takes the form of a contractual provision whereby title to the stamps is said to remain with the stamp company at all times. The mechanics of the general plan is well set out in the case of *Sperry & Hutchinson v. Hoegh.*[113] Significantly, these restraints are also purportedly imposed on the individual collector. Within each stamp book is printed a notice to the collector, representative of which is the following excerpt from the stamp books of Sperry & Hutchinson:

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109 Note, 38 Mich. L. Rev. 573, 577 (1940).

110 See Fulda, Resale Price Maintenance, 21 U. Chi. L. Rev. 175, 179-206 (1954).

111 McLaughlin, supra note 70, at 813.

112 Comment, 66 Yale L.J. 436, 444 (1956).

113 246 Iowa 9, 65 N.W.2d 410 (1954).

> Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company. . . . *The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption.* You must not dispose of them or make any further use of them without our consent in writing . . . if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. [Emphasis supplied.]

The validity of these latter restraints was in issue in the recent case of *Merchants' Green Trading Stamp Co. v. Vornado, Inc.*[114] The trading stamp company instituted this action against a department store which was engaged in the practice of exchanging plaintiff's stamps for its own. While the court denied the prayer for interlocutory injunctive relief, it did instruct the defendant to clearly publicize the fact that it was not conducting its operations under any authority from the complainant. Then, with an exercise of judicial caution, the court summarily addressed itself to the question of the restraints imposed by the stamp company: "The question of the legality of the plaintiff's contracts with its retail merchants, and its alleged contractual relation with the buying public will be resolved at a future date."[115]

Because plaintiff's case sounded in tortious interference with contractual and advantageous relations, the court attempted to distinguish existing case law which would appear to be conclusive on the point in question. *Sperry & Hutchinson v. Louis Weber & Co.*[116] was declared inapplicable on the grounds it was an example of intentional, malicious and direct interferences. The case at bar, it was suggested, presented an example of a mere diverting to one's self the customers of a rival by a superior offer—a legitimate mode of promoting one's own interests. A similar perspective was employed in differentiating the case of *Sperry & Hutchinson v. Siegel.*[117]

It seems unfortunate in this developing area that the court based its conclusions on the narrow confines of intentional interference with contractual relations. An initial weakness in this approach is the obvious requirement that there be found a valid contract;[118] further, it must be proved that the alleged tortfeasor was acting primarily to induce a breach of the contract rather than gaining some independent objective of his own.[119] The importance of these considerations is well illustrated by the weight given them in the *Vornado* decision. It is submitted that a fuller consideration of the facts would have brought the case squarely within the broader rule of the "unfair competition" cases, as exemplified in *International News Service v. Associated Press,* which prohibit "unauthorized interference with the normal operation

[114] 75 N.J. Super. 523, 183 A.2d 489 (1962).

[115] Id. at 535, 183 A.2d at 496.

[116] 161 Fed. 219 (C.C.N.D. Ill. 1908).

[117] 309 Ill. 193, 140 N.E. 864 (1923).

[118] E. R. Squibb & Sons v. Shapiro, Inc., 269 App. Div. 978, 64 N.Y.S.2d 368 (Sup. Ct. 1945); Restatement, Torts § 766, comment c; Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 663, 700 (1923).

[119] Lamport v. 4175 Broadway, 6 F. Supp. 923 (S.D.N.Y. 1934); Restatement, Torts § 766, comment i.

of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not. . . ."[120]

This concept of "endeavoring to reap where it has not sown" may have been implicitly recognized by the New Jersey court in that it enjoined any actions or advertisements of the defendant which might lead one to conclude that defendant was pursuing his stamp business under the authority of the complainant. However, the more recent decisions have gone beyond this prohibition of "palming off" indicated in *Associated Press*, and the scope of unfair competition has been extended to "misappropriation as well as misrepresentation."[121] Thus, among competitors, an effort to profit from the labor, skill, expenditures, name and reputation of others constitutes enjoinable unfair competition.[122] The actions of Vornado in appropriating the commercial interest that the company retained in the stamps (*i.e.*, the right to exclusive redemption) would not seem to be distinguishable from cases involving live broadcasts of sporting events by a competitor of a licensed broadcaster, where the court issued injunctions to protect the interest retained by the sports promoter in the public event (*i.e.*, the right to exclusive broadcast).[122a]

Sperry & Hutchinson v. Mechanics' Clothing Co., an early federal case, would appear to be authority for the position that the restrictive covenants are not binding on the collector.[123] However, for reasons to be suggested, it is doubtful that this decision would now be completely followed. The case is factually distinguishable in that the restrictive covenants sought to be imposed were not brought to the attention of the collector at any time.

> The advertising book, or subscriber's book, issued to the public, does not inform the public of the terms of the agreement between the company and the merchant. . . . The public is not informed that stamps are redeemable only when presented in books.[124]

This appears to have been a factor that weighed heavily on the court's judgment.

The stamp itself was described as a mere token which did not convey on its face any indication of the restrictions on its transferability. Further, the court implied that imposing a condition precedent of placing the stamps in a book for redemption after the customer had "purchased" the stamps without having been informed of such a condition would be invalid, especially after the company had advertised that articles "will be exchanged for 990 green trading stamps, *or* one filled book." (Emphasis supplied.) The books with the restriction, then, were considered something of a convenience for the

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120 International News Service v. Associated Press, 248 U.S. 215, 240 (1918).

121 Schecter Poultry Corp. v. United States, 295 U.S. 495, 532 (1935).

122 Dior v. Milton, 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956).

122a Pittsburg Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938). But see National Exhibition Co. v. Teleflash, 24 F. Supp. 488 (S.D.N.Y. 1936). Compare Citizens Telephone Co. v. Tel. Service Co., — F. Supp. — (D.N.C. 1963) with New Eng. Tel. & Tel. Co. v. Nat. Merch. Corp., 335 Mass. 668, 141 N.E.2d 702 (1957).

123 128 Fed. 800 (C.C.D.R.I. 1904).

124 Id. at 801.

consumer rather than an essential part of the stamp plan.[125] It was but a logical progression for the court to conclude that because sufficient notice was not brought to bear on the collector, the obligation of the stamp company to redeem was unaffected by subsequent transfers of the trading coupons. "A collector of the stamps is doubtless a holder for value, and there appears no reason why he cannot transfer his rights of redemption, to any person and upon such terms as he may see fit."[126]

If the stamp plans are examined in the context of contract law, it would appear that this question of notice is a crucial one. The individual collector can hardly be considered to have assented to the terms of the offer if he has not had them called to his attention or could not reasonably be expected to know of them. It cannot be said as a matter of law that failure to read what on its face does not purport to be a contract binds the collector to its terms.[127] It is significant that the extensive advertising campaigns of the companies do not mention this restrictive covenant.[128]

Even if it is assumed that these difficulties can be resolved on the side of finding a binding restriction on the consumer as well as the retailer, the question remains whether or not it is to be realistically enforced. At first, it would seem that this is somewhat akin to an attempt to enforce an "equitable servitude" on a chattel. In general, the imposition of such servitudes on chattels has met with little success in the courts, although there

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[125] Ibid.

[126] Ibid. See also E. I. DuPont de Nemours & Co. v. Kaufman & Chernick, Inc., 337 Mass. 216, 220, 148 N.E.2d 634, 636 (1958), where the giving of a "gift" of a fair-traded article with the purchase was considered a *sale* in violation of the fair trade law. Applying this rationale, the argument could be made that the stamps are "purchased." If this were so, then title would have passed to the collector unless effective notice was given. See Uniform Commercial Code § 2-403. See Merchants Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N.E. 968 (1915), treating the stamps as chattels of value, thus apparently placing them within the Code's definition of "goods." Uniform Commercial Code § 2-105.

See also the dissent in Bristol-Myers v. Lit Bros., 336 Pa. 81, 92, 6 A.2d 843, 849 (1939): "When a customer purchases a tube of appellant's tooth paste for 39 cents, he does not pay 39 cents for the tooth paste alone but for the trade-marked commodity and the trading stamp." This concept of "selling two articles for the price of one," Safeway Stores v. Oklahoma Retail Grocers, supra note 96 at 187, would seem to be the approach adopted by those jurisdictions holding stamps violative of the fair trade laws.

[127] Kergald v. Armstrong Transfer Exp. Co., 330 Mass. 254, 113 N.E.2d 53 (1953); accord, Klar v. H. & M. Parcel Room, Inc., 296 N.Y. 1044, 73 N.E.2d 912 (1947).

[128] Mass. Gen. Laws Ann. ch. 93, § 14M (1958), states, in part:

> The said company shall, at the option of the *rightful* holder of such stamps, redeem the stamps in cash when *duly presented* for redemption in a number having an aggregate cash value of not less than twenty-five cents. (Emphasis supplied.)

Although not specifically so stating, it appears that the drafters did recognize the limited rights acquired by the consumer; first, by its use of the qualifying adjective "rightful" in describing which holders may redeem their stamps, and second, when the statute refers to redeeming only those stamps that are "duly presented." Presumably then, the stamp company is acting within the relevant statute when it refuses to accept stamps that are not properly pasted into the books provided for this purpose. Nonetheless, whether this act of insertion is sufficient to bring to the collector's attention the restrictions on transferability is still an open question after referring to the applicable statute. Other states with less carefully drafted statutes may have given the right to redeem without the book, thus destroying any effect of the attempted restriction. See note 134 infra.

exists a scant body of authority which could be drawn upon to defend such an arrangement.[129] Certainly, considering the interest in the use of the stamps which is retained by the stamp company, one would have reservations concerning the applicability of this theory if it is concluded that the restrictions on transferability of the stamps are effectively imposed on the consumer. Those cases dealing with equitable servitudes on chattels have been situations involving sales of chattels with an attempt to retain a string or thread of control although title has passed. It would be an abuse of the obvious to suggest that if it were determined that the individual collector is not adequately notified of these restrictions, then an unrestricted title would have passed and the equitable servitude doctrine would be inapplicable.

A case that seems more nearly in point is that of *International News Co. v. Williams*.[130] A distributor of comic books reserved title to the magazines as stated in certain contractual provisions between the wholesalers and distributors. Under the agreement, the retail outlet returned any unsold books to the wholesaler, who removed the covers and sent them to the distributor for a credit. He was then permitted to sell the remaining part of the comics for waste only. The court held this latter restriction was not binding on a buyer who in the ordinary course of business and "without knowledge" of such contractual arrangement, purchased the coverless books for resale.[131] The court cited as authority the *Mechanics' Clothing Co.* case.

It should be noted that the element of notice in the third party was similarly absent in the *Williams* and *Mechanics' Clothing Co.* cases; the same would not be true of the third party, the stamp clearing house, in the *Vornado* fact situation.[132] Futhermore, it is notable that the unique character of the trading stamp itself renders apparent precedents—not specifically dealing with stamps—less valuable. In the case of the comic books, for example, an eventual sale is intended, and this is the contemplated end of all parties to the distribution process. The stamps, on the other hand, are mere tokens, valuable in a market only for potential redemption by the issuer. Whether labeled a cash discount, a price reduction or an ambiguous promotional device, by implication the stamps are not considered by the vast majority of the courts as something sold to the consumer.

Certain valuable interests are to be protected by upholding restraints on the transferability of the stamps. If one can obtain these stamps without patronizing the particular outlet authorized to distribute them, and which is paying for this privilege in the hope of increased business, then the value or incentive for the continuance of the plan by the merchant is effectively

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129 See Nadell & Co. v. Grasso, 175 Cal. App. 2d 420, 346 P.2d 505 (1959); Chafee, The Music Goes Round and Round: Equitable Servitudes on Chattels, 69 Harv. L. Rev. 1250 (1956); 1 B.C. Ind. & Com. L. Rev. 215 (1960).

130 293 F.2d 510 (3d Cir. 1961), noted 3 B.C. Ind. & Com. L. Rev. 310 (1962).

131 Id. at 514.

132 If the notice provisions are not binding on the individual collector so that he is a purchaser in the ordinary course of business, he would be able to pass full title to a third party, regardless of the latter having any knowledge of the contractual limitations on transferability. It is only when the third party assumes the role of one pirating, for competitive commercial purposes, the stamp company's good will that the umbrella theory of protection would be contravened by concepts of unfair competition. See supra note 120 and accompanying text.

stifled.[133] It should be noted that the enactment of a statute which compels the stamp companies to redeem as few as five cents' worth of stamps for cash,[134] has indirectly limited the protection of the retailer's interest in inducing the consumer to return to fill more books. However, since much of this legislation was sponsored by the stamp companies themselves, it would be unrealistic to interpret such enactments as a legislative proclamation that such an interest is no longer to be protected.

In conclusion, so long as the stamp plans are allowed to function and flourish, it appears that the restrictions imposed by the companies are essential. This is not to say, however, that some further steps may not be required to insure that full knowledge of the workings of these plans be imparted to the public. In light of these conclusions, the New Jersey decision in the *Vornado* case is particularly disturbing. It borders on the specious for a realistic court to countenance enforcement only against the breaching individual collector who transfers his coupons to these stamp traders for another type of stamp or for merchandise. Even as to those collectors who have obtained their stamps from the clearing house, it would be impossible to refrain from redeeming their proffered books because of the identification problems, if for none other. Where stamp plans are permitted to operate, it appears inconsistent to interpret the substantive tort law so as to deny an injunction against a party actively engaged in such practices.

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[133] See Colgate-Palmolive Co. v. Max Dichter & Sons, 142 F. Supp. 545 (D. Mass. 1956).

[134] N.J. Stat. Ann. § 45:23-2 to -3 (1940).